

PROPOSED MICHIGAN STANDARDS FOR IMPOSING LAWYER SANCTIONS
[Without Commentary]

(Submitted in June 2002 by the Attorney Discipline Board)

Preface

These Michigan Standards for Imposing Lawyer Sanctions were adopted by the State of Michigan Attorney Discipline Board (ADB or Board) on [date] under the authority granted by the Michigan Supreme Court in its order dated [date], and are intended for use by the Attorney Discipline Board and its hearing panels in imposing discipline following a finding or acknowledgment of professional misconduct. Pursuant to the Court's order, these standards may be amended by the Board from time to time. The Court may at any time modify these standards or direct the Board to modify them.

Definitions

"Injury" is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from "serious" injury to "little or no" injury; a reference to "injury" alone indicates any level of injury greater than "little or no" injury.

"Intent" is the conscious objective or purpose to accomplish a particular result.

"Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

"Negligence" is the failure of a lawyer to exercise the degree of care that a reasonable lawyer would exercise in the situation.

"Potential injury" is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct. The likelihood and gravity of the potential injury are factors to be considered in deciding the level of discipline.

A. PURPOSE AND NATURE OF SANCTIONS

1.1 Purpose of Lawyer Discipline Proceedings

The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system, and the legal profession.

1.2 Public Nature of Lawyer Discipline

Ultimate disposition of lawyer discipline should be public in cases of disbarment, suspension, and reprimand. Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer, should private discipline be imposed.

1.3 Purpose of These Standards

These standards are designed for use in imposing a sanction or sanctions following a determination by a preponderance of the evidence or acknowledgment that a member of the legal profession has violated a provision of the Michigan Rules of Professional Conduct or subchapter 9.100 of the Michigan Court Rules. Descriptions in these standards of substantive disciplinary offenses are not intended to create independent grounds for determining culpability. These Standards are designed to permit flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct while also promoting: (1) consideration of all factors relevant to imposing the appropriate level of sanction in an individual case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; and, (3) consistency in the imposition of disciplinary sanctions for the same or similar offenses.

B. SANCTIONS AND OTHER CONSEQUENCES FOR MISCONDUCT

2.1 Scope

A disciplinary sanction is imposed on a lawyer upon a finding or acknowledgment that the lawyer has engaged in professional misconduct.

2.2 Disbarment

Disbarment means revocation of the license to practice law. An attorney whose license to practice law has been revoked may petition for reinstatement under MCR 9.124 but may not do so until 5 years have elapsed since revocation of the license. Eligibility for reinstatement is determined under MCR 9.123, which requires a disbarred attorney to establish by clear and convincing evidence the elements of MCR 9.123(B) and requires recertification by the Board of Law Examiners.

2.3 Suspension

Suspension is the removal of a lawyer from the practice of law for not less than 30 days. See MCR 9.106(2). An attorney suspended for 180 days or more is not eligible for reinstatement until the attorney has petitioned for reinstatement under MCR 9.124, has established by clear and convincing evidence the elements of MCR 9.123(B), and has complied with other applicable provisions of MCR 9.123.

2.4 Interim Suspension

Interim suspension is the temporary suspension of a lawyer from the practice of law pending imposition of final discipline. Interim suspension includes:

- (a) automatic suspension upon conviction of a felony (MCR 9.120(B)) or,
- (b) suspension of a lawyer who fails to comply with the lawful order of a hearing panel, the Board or the Supreme Court (MCR 9.127(A)).

2.5 Reprimand

Reprimand is a form of public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.

2.6 [Reserved]

2.7 Probation

Probation is a sanction which may be imposed upon an impaired lawyer as set forth in MCR 9.121(C).

2.8 Other Sanctions and Remedies

Other sanctions and remedies which may be imposed include:

- (a) restitution;
- (b) transfer of an incompetent or incapacitated attorney to inactive status (MCR 9.121(A)&(B))¹; or
- (c) such conditions relevant to the established misconduct as a hearing panel, the Board, or the Supreme Court deems consistent with the purposes of lawyer sanctions.

2.9 Reciprocal Discipline

Reciprocal discipline is the imposition of a disciplinary sanction on a lawyer who has been disciplined in another jurisdiction. The only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings and whether imposition of identical discipline in Michigan would be clearly inappropriate. MCR 9.104(B).

C. FACTORS TO BE CONSIDERED IN IMPOSING SANCTIONS

3.0 Generally

In imposing a sanction after a finding or acknowledgment of lawyer misconduct, the Board and hearing panels should consider the following factors:

- (a) the nature of the misconduct;
- (b) the lawyer's mental state;
- (c) the potential or actual injury caused by the lawyer's misconduct;
- (d) the circumstances of the misconduct, including the existence of aggravating or mitigating factors; and
- (e) precedent of the Court and the Board.

3.1 Application of Standards

¹ An attorney may be ordered transferred to inactive status under MCR 9.121(A) and (B) without a finding of misconduct.

In considering the foregoing factors and applying these standards, hearing panels, the Board, and others should:

- (a) Consult Appendix 1 (Cross-Reference Table: Michigan Rules of Professional Conduct and Standards for Imposing Sanctions) and locate the rule violated and a reference to the pertinent standard in Section D;
- (b) determine which of the factors present in the pertinent standard apply, and select the appropriate recommended sanction;
- (c) consider whether the recommendation adequately addresses the nature or effects of the misconduct, and articulate any basis for selecting an alternative sanction as a baseline;
- (d) refer to the commentary and precedent to refine the recommendation; and,
- (e) consider aggravating and mitigating factors (see Section E).

D. RECOMMENDED SANCTIONS

The recommended sanctions in the following standards take into account the factors set forth in Standard 3.0 and are generally appropriate for the types of misconduct specified, absent aggravating or mitigating circumstances.

4.0 Violations of Duties Owed to Clients

4.1 Failure to Preserve the Client's Property

The following sanctions are generally appropriate in cases involving the failure to preserve client property:

- 4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property.
- 4.12 Suspension is generally appropriate when a lawyer knowingly or negligently deals improperly with client property.
- 4.13 Reprimand is generally appropriate when a lawyer engages in an isolated instance of simple negligence in dealing with client property and causes little or no injury or potential injury to a client.

4.2 Failure to Preserve the Client's Confidences

The following sanctions are generally appropriate in cases involving improper revelation of information relating to representation of a client:

- 4.21 Disbarment is generally appropriate when a lawyer, with the intent to benefit the lawyer or another, knowingly reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.
- 4.22 Suspension is generally appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.

- 4.23 Reprimand is generally appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes injury or potential injury to a client.

4.3 Failure to Avoid Conflicts of Interest

The following sanctions are generally appropriate in cases involving conflicts of interest:

- 4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):
- (a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or
 - (b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or
 - (c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.
- 4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.
- 4.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

4.4 Lack of Diligence

The following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client:

- 4.41 Disbarment is generally appropriate when:
- (a) a lawyer abandons the practice of law and causes serious or potentially serious injury to a client; or
 - (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or
 - (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.
- 4.42 Suspension is generally appropriate when:
- (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or
 - (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

- 4.43 Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.

4.5 Lack of Competence

The following sanctions are generally appropriate in cases involving failure to provide competent representation to a client:

- 4.51 Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client.
- 4.52 Suspension is generally appropriate when a lawyer knowingly fails to provide competent representation, and causes injury or potential injury to a client.
- 4.53 Reprimand is generally appropriate when a lawyer:
- (a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or
 - (b) negligently fails to provide competent representation and causes injury or potential injury to a client.

4.6 Lack of Candor

The following sanctions are generally appropriate in cases where the lawyer engages in fraud, deceit, or misrepresentation directed toward a client:

- 4.61 Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client.
- 4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.
- 4.63 Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.

5.0 Violations of Duties Owed to the Public

5.1 Failure to Maintain Personal Integrity

The following sanctions are generally appropriate: (a) in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; (b) in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation; or (c) in cases involving the improper handling of property entrusted to a lawyer.

- 5.11 Disbarment is generally appropriate when:
- (a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, intentional misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an

attempt or conspiracy or solicitation of another to commit any of these offenses; or

- (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice; or
- (c) a lawyer knowingly converts the property of another entrusted to the lawyer.

5.12 Suspension is generally appropriate when:

- (a) a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 but which nevertheless seriously adversely reflects on the lawyer's fitness to practice; or
- (b) a lawyer engages in conduct involving dishonesty, fraud, deceit, or knowing misrepresentation that reflects adversely on the lawyer's fitness to practice; or
- (c) a lawyer knowingly or negligently deals improperly with the property of another entrusted to the lawyer.

5.13 Reprimand is generally appropriate when:

- (a) a lawyer engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that reflects adversely on the lawyer's fitness to practice; or
- (b) a lawyer engages in any conduct that involves dishonesty, fraud, deceit, or knowing misrepresentation and that adversely reflects on the lawyer's fitness to practice law to a slight degree; or
- (c) a lawyer engages in an isolated instance of simple negligence in dealing with the property of another entrusted to the lawyer and causes little or no injury or potential injury.

5.2 Failure to Maintain the Public Trust

The following sanctions are generally appropriate in cases involving public officials who engage in conduct that is prejudicial to the administration of justice or who state or imply an ability to influence improperly a government agency or official:

- 5.21 Disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another, or with the intent to cause serious or potentially serious injury to a part or to the integrity of the legal process.
- 5.22 Suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.
- 5.23 Reprimand is generally appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.

6.0 Violations of Duties Owed to the Legal System

6.1 False Statements, Fraud, and Misrepresentation to a Tribunal

The following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a tribunal:

- 6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the tribunal, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury.
- 6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the tribunal or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury.
- 6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents submitted to a tribunal are

false or in taking remedial action when material information is being withheld and causes injury or potential injury.

6.2 Abuse of the Legal Process

The following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists:

- 6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.
- 6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.
- 6.23 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

6.3 Improper Communications with Individuals In the Legal System

The following sanctions are generally appropriate in cases involving attempts to influence a judge, juror, prospective juror or other official by means prohibited by law:

- 6.31 Disbarment is generally appropriate when a lawyer:
 - (a) intentionally tampers with a witness and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or
 - (b) makes an ex parte communication with a judge or juror with intent to affect the outcome of the proceeding, and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or
 - (c) improperly communicates with someone in the legal system other than a witness, judge, or juror with the intent to influence or affect the outcome of the proceeding, and causes significant or potentially significant interference with the outcome of the legal proceeding.
- 6.32 Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.
- 6.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding.

7.0 Violations of Other Duties Owed as a Professional

The following sanctions are generally appropriate in cases involving false or misleading communication about the lawyer or the lawyer's services, improper communication of fields of practice, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation, or failure to report professional misconduct.

- 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.
- 7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.
- 7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

8.0 Practice of Law in Violation of an Order of Discipline

The following sanctions are generally appropriate in cases involving the practice of law in violation of an order of discipline.

- 8.1 Disbarment is generally appropriate when a lawyer intentionally practices law in violation of the terms of a disciplinary order.
- 8.2 Suspension is generally appropriate when a lawyer knowingly practices law in violation of the terms of a disciplinary order.
- 8.3 Reprimand is generally appropriate when a lawyer negligently practices law in violation of the terms of a disciplinary order.

E. Aggravation and Mitigation

9.1 Generally

After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.

9.2 Aggravation

- 9.21 Definition. Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed.
- 9.22 Factors which may be considered in aggravation include:
 - (a) prior disciplinary offenses;
 - (b) dishonest or selfish motive;
 - (c) a pattern of misconduct;
 - (d) multiple offenses;
 - (e) obstruction of the disciplinary proceeding by knowingly failing to comply with rules or orders of the disciplinary agency;

- (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- (g) refusal to acknowledge wrongful nature of conduct;
- (h) vulnerability of victim;
- (i) substantial experience in the practice of law;
- (j) indifference to making restitution;
- (k) illegal conduct, including that involving the use of controlled substances.

9.3 Mitigation

9.31 Definition. Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.

9.32 Factors which may be considered in mitigation include:

- (a) absence of a prior disciplinary record;
- (b) absence of a dishonest or selfish motive;
- (c) serious personal or emotional problems which contributed to the misconduct;
- (d) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
- (f) inexperience in the practice of law;
- (g) character or reputation;
- (h) physical disability which contributed to the misconduct;
- (i) mental disability or chemical dependency including alcoholism or drug abuse when:
 - (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
 - (2) the chemical dependency or mental disability contributed to the misconduct;
 - (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
 - (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely;
- (j) delay in disciplinary proceedings;
- (k) imposition of other penalties or sanctions;
- (l) remorse.

9.4 Factors Which Are Neither Aggravating nor Mitigating

The following factors should not be considered as either aggravating or mitigating:

- (a) forced or compelled restitution;
- (b) agreeing to the client's demand for certain improper behavior or result;
- (c) withdrawal of complaint against the lawyer;
- (d) resignation prior to completion of disciplinary proceedings;
- (e) complainant's recommendation as to sanction;
- (f) failure of injured client to complain.